Supreme Court, U.S.
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No. 10-21 JUN 28 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 27, 2010

QUESTION PRESENTED

Because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court, the petitioner humbly requests:

Will the United States Supreme Court *please* grant the *pro se* petitioner in this case an exercise of this Court's supervisory power?

PARTIES

The parties are, as represented by the caption to this case:

The petitioner is Kevin H. McKenna *pro se*.

The respondent is the Nestle Purina PetCare Co.

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OPINIONS BELOW

The United States District Court, Southern District of Ohio, Eastern Division did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 1-13.

The United States Court of Appeals for the Sixth Circuit issued a per curium order, did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 14-18.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued a *per curium* order on November 23, 2009. Petitioner's timely petition for rehearing and rehearing en-banc was DENIED on February 17, 2010.

On May 3, 2010 Justice Stevens GRANTED Petitioner's Application No. 09A1047, and extended the time to file this petition to and including July 17, 2010. This Court has jurisdiction under 28 U.S.C § 1254(1) to review the circuit Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e– 2(a):

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or nation-al origin; or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-cause of such individual's race, color, religion, sex, or national origin." .

42 U.S.C. §2000e– 3(a):

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.".

STATEMENT OF CASE

I. Foreword:

The Respondent Nestle Purina PetCare (Nestle) has been maliciously misrepresenting Nancy J. Goss (Goss) as merely a "key witness" for purposes in this case, from within the underlying Title VII action. To be absolutely clear for this Court: Goss is the perpetrator of *perverse* workplace stalking, sexual and retaliatory harassment victimizing Kevin H. McKenna (McKenna) in and out of the workplace,

as cause of action in underlying litigation against Nestle.

Even prior to McKenna's termination of employment with Nestle in October 2004, McKenna has consistently asserted that Goss's behavior is "clinically delusional", "obsessive", and McKenna feared for his life by Goss. Since that time in 2004, McKenna has researched conditions similar to those, which McKenna has experienced in interacting with Goss. On November 04, 2006, McKenna served notice by means of email upon Nestle's legal counsel that it was in McKenna's "layman opinion [Goss] suffers from **Erotomania**". While the text of McKenna's' email to Nestle's legal counsel may not constitute expert testimony on the topic, within that same email, McKenna also appended a description of **Erotomania**, also known as "*de Clerambault Syndrome*", which McKenna believed reasonably depicts Goss's behavior. A true and accurate copy of the text of that email communication is included in this petition's **Appendix pp. 39 – 45**.

Since Goss's perverse behavior represents cause(s) of pending liability against Nestle, in both this and the underlying Title VII litigation, it provides an *extremely perverse* incentive for Nestle's legal counsel to misrepresent Goss's true character and actual role in these matters. The essence of this case, is the deliberate criminal actions taken by Nestle's legal counsel through it's access to pending Title VII litigation in the Federal Courts, as a means to incite and enable access by Goss (a stalker) as a vehicle or "cat's paw", to impose further harms upon McKenna outside the workplace, in an exceptionally perverse manner to "dissuade" McKenna from making or supporting a charge of discrimination.

II. Overview of the Case

A. Relevant Background of the Underlying Title VII Case, Which Gives Rise to This Case.

McKenna was employed with Nestle as a PC Technician from October 15, 2001 until McKenna's employment was terminated by Nestle on October 14, 2004. At the time McKenna's employment with Nestle was terminated, McKenna was forty-six (46) years of age, and happily married to his one and only wife of twenty-four (24) years.

From October of 2003 until late Spring of 2004, albeit McKenna was happily married, McKenna had unwittingly shared a consensual but *restricted*, sexually erotic natured *workplace* friendship (hereafter, "workplace friendship") with a co-worker, Nancy J. Goss (Goss). Consistent with the fact that McKenna was at that time, and still is happily married, it was a consensual stipulation between Goss and McKenna that McKenna would ***not*** consent to an *overtly sexual*, or any variation of a *romantic* interaction with Goss.

In the Spring of 2004, Goss developed a psychotic sexual obsession over McKenna. Goss began stalking and manifesting perverse hostility, or as Goss's self-described, "**FREAK reactions**" towards McKenna and *any* female Goss may have delusionally suspected McKenna *may* interact with at the workplace. At this point, Goss's perverse hostility substantially impaired McKenna's ability to perform his job duties, and McKenna's workplace friendship with Goss was no longer consensual.

In July of 2004, McKenna terminated the workplace friendship with Goss, mandating that

Goss's interactions with McKenna were now to be "100% professional". McKenna's termination of the workplace friendship infuriated Goss, escalating Goss's hostility, to stalking and harassment of McKenna. Now in fear Goss's hostility may likely escalate into potentially *fatal* violence by Goss, on July 28, 2005 at 2:20 PM McKenna informed local police of Goss's of the perverse hostility, "...in case they did find his body, possibly floating in the river, the police would know who to go after.".

On August 31, 2004, due to Goss's still unrelenting hostility through the month of August, McKenna now complained of Goss's harassment, providing information regarding Goss and McKenna's prior workplace friendship, McKenna's recent visit to the local police to Nestle's HR Manager. Shortly after, Nestle's HR Manager initiated an "informal internal investigation" into the matter. McKenna cooperated with Nestle's investigation up to and including when McKenna's employment was terminated on October 14, 2004.

On September 27, 2004, now fearing death due to overt hostility by Goss, McKenna urgently notified Nestle's HR Manager that, Goss's hostility was now intolerable and that the situation had escalated to a state of immanent crisis requiring immediate intervention by Nestle. Nestle placed Goss on administrative leave to facilitate Nestle's now, *formal* investigation into Goss's behavior.

On Friday, October 8, 2004, McKenna was also placed on administrative leave to facilitate Nestle's internal investigation into the matter. On Monday, October 11, 2004, Nestle initiated an investigation into alleged wrong doings by McKenna. On October 14, 2004 McKenna's employment and all employment

benefits were immediately terminated by Nestle, citing alleged violation of Nestle's email policy.

On October 15, 2004, Nestle gave notice to Goss that her employment was terminated for being an "over threat", for harassing and threatening her co-worker(s). However, Nestle extended Goss's pay and employment benefits for yet another additional week, until October 22, 2004.

On October 28, 2005, McKenna filed a complaint of sexual harassment and retaliation against Nestle in Federal District Court. On January 24 2006, formal court proceedings were initiated. The District Court held its initial pretrial conference at which time, Nestle's counsel served "Defendants Nestle Purina PetCare Co's Rule 26(a)(1) Pre-Discovery Disclosures", upon McKenna.

B. Prior Notice Previously Served Upon Nestle Regarding McKenna's Fear of Extreme Hostility by Goss.

• On October 18, 2004, in a protest to Nestle's termination of McKenna's employment, McKenna sent an email to Nestle stating, "*The primary reason this situation occurred that lead to my termination of employment is that I felt there was a very real possibility that* [Goss] *could or would impose physical harm upon herself and or workmates, either in or out of the workplace.*"; "*...the very real, perceived threat of, and my visions of* [Goss] *not only walking into the workplace, murdering me at my desk...*"; "*I went to* [Nestle's HR Manager] *because I felt the threat, or a potential of a threat was VERY REAL.*" (*underline emphasis added*).

• On November 21, 2005, Nestle admitted in Nestle's formal Answer to McKenna's Complaint, that Goss's employment with Nestle was: "*... terminated for being an "over threat", for harassing and threatening her co-worker(s)*".

Within one week immediately following pretrial conference on January 24 2006, marking proceedings, which *may* re-involve McKenna with Goss, McKenna served formal notice upon Nestle's *counsel* of Goss's overt hostility towards McKenna.

• On February 1, 2006 at 3:05 PM, McKenna sent direct notice to Nestle's attorneys by electronic mail, informing Nestle that: "*Nancy J. Goss is perceived to be an "Overt Threat" by myself and my family*"; "*(This document will be kept on record, so that in the case that a situation arises in the future, that you were expressly informed and REQUESTED to exercise due and reasonable care in regards to this matter)*".

• On February 1, 2006 at 10:12 PM, by means of electronic mail, McKenna again directly notified Nestle that: "*Suffice to say, words can not properly express how intensely serious I am that EXTREME CARE MUST BE TAKEN if some sort of action is going to even indirectly (re)involve Nancy with me.*"; McKenna was, "*STALKED in complete absence of rational thought and behavior*" by Goss.

• On February 22, 2006 at 1:36PM, by means of electronic mail, McKenna communicated to Nestle, his concerns of having his life (again) exposed to Goss' perception of her relationship with McKenna, stating: "*I will not knowingly, nor willingly allow or subject myself and/or any aspect of my life to (again) be exposed to her psychotic delusions*".

• On or about April 14, 2006, Nestle was formally served, by means of a Certified (signed, notarized, and sworn to be true) response to the Nestle's formal Rule 33 Discovery Request, McKenna stated: "*The Plaintiff deems Nancy J. Goss to be a STALKER, and therefore an overt threat to the Plaintiff's life and anything that may associate with the Plaintiff's life*".

• On June 12, 2006 at 12:39 PM, by means of electronic mail, Nestle was formally served public record of the Zanesville Police Department (ZPD) titled: "Supplementary Report", dated: "6/8/06", Inc.#: 0601125, Referencing McKenna's **July 28, 2004** visit to the ZPD, which states in part: *"He stated that while at work, he was being, in his opinion, sexually harassed by a female employee there"; "According to McKenna, he was in fear that the whole situation may become violent at some time."; "He stated that he would just like to have note of it in case they did find his body, possibly floating in the river, the police would know who to go after."*. **(Appendix pp. 53 – 55)**

• On June 16, 2006 at 10:13AM, by means of electronic mail, McKenna informed Nestle that by means of documents within Nestle's possession, that Goss has a documented "*history of Psychiatric/ Psychological issues of which have required her to be under the care of a Therapist*"; "*I have advised and warned you REPEATEDLY as to Nancy Goss's potentially hostile/violent irrationality, let this SERVE as my last best effort to have properly (warned) informed you.*"

• On November 4, 2006 at 8:43 AM, by means of electronic mail, McKenna informed Nestle's attorneys that it was McKenna's belief that Goss is an **Erotomaniac Stalker**: "*While I am not an "expert", I lived and am living the experince, I know what*

happened, and in my layman's opinion, Nancy suffers from Erotomania, and unfortunately for me, she had idolized me since before my employment with Purina (IE - Interview).". Significantly, McKenna had appended a description of the disorder to the end of the email. **(Appendix pp. 39 – 45)**

• On January 13, 2007 at 3:29 PM, by means of electronic mail: *"I *KNOW* she is dellusional, and to this day in my life, she is THEE single most hostile entity I have ever encountered, and I WILL NOT CONFRONT her until I have completely resolved to myself that I am literally willing to take her life, in defense of my life, and/or those around me.".*

C. **Stipulation By The Parties to a Prior Adulterated Workplace Friendship, Prior to Deposition of Goss.**

• On July 6, 2005, Nestle stated in its' Position Statement to EEOC that McKenna and Goss had maintained a prior consensual relationship. In September 2005, prior to the onset of litigation, McKenna obtained Nestle position statement to EEOC by the Freedom of Information Act.

• On October 28, 2005, in McKenna's formal Complaint of discrimination on file with the District Court: McKenna formally and expressly stated that McKenna had maintained a prior workplace friendship with Goss.

• On November 21, 2005 Nestle filed its formal answer to McKenna's complaint; 1) ¶2 **Nestle admitted** McKenna maintained a workplace friendship with Goss *as alleged in McKenna's complaint*; 2) ¶3 **Nestle admitted** McKenna informed Nestle of that same friendship.

• On April 14, 2006, by formal interrogatory response, McKenna further stipulated to Goss and McKenna's prior workplace friendship, where *McKenna* further articulated that *some* "sexual acts" occurred within the context of McKenna's past workplace friendship with Goss.

• On May 30, 2006, in response to McKenna's "Fourth Request for Production of Documents", Nestle produced the "Nancy Goss Investigation Statement" as referenced within "Defendants Nestle Purina PetCare Co's Rule 26(a)(1) Pre-Discovery Disclosures". Within that investigation statement now known to McKenna, Goss alleged specific sexual acts, conversations and emails transpired between McKenna and Goss during the workplace friendship.

It is inarguable that all of these aforementioned events, predate Goss's deposition testimony taken on "October 17, 18 and 19, 2006". It is logically impossible to assert that any such deposition testimony by Goss to that effect, on those dates, in any way "undermines Plaintiff's case and claims".

D. Overview of Case in Chief.

1) Nestle's Harassment of McKenna

On October 17, 18, and 19, 2006, Nestle and McKenna conducted deposition of Goss. By stipulation of Nestle, Goss and McKenna during the time of the deposition, Goss's deposition transcript was to remain **sealed "until trial"**. As a novice, *pro se* litigant, McKenna reasonably believed that "**sealed 'until trial'**" meant that Goss's deposition transcript was proof read by Goss, it would then be 100% inaccessible (IE – "**sealed**") to all parties, "until trial".

As such, McKenna could have no motive to give consideration to allegations made within Goss's "**sealed**" deposition transcript!

In November of 2006, Nestle made substitution of its lead counsel attorney to Brian E. Dickerson (Dickerson) and co-counsel Jonathan R. Secrest (Secrest). Within the first 45 days as counsel for Nestle, on January 14, 2007, as a clear testament to Nestle's internal complaint mechanisms, *and* seeking redress by litigation as being completely ineffective processes, Dickerson sent a sexually harassing email (harassing email) to McKenna, derived from Goss's **sealed** deposition testimony! Dickerson himself was now perversely acting as a conduit, as a perpetrator of Goss's harassment upon McKenna. Unbelievably Dickerson sent the harassing email directly to McKenna the actual victim of Goss's harassment, the aggrieved plaintiff in the underlying Title VII litigation (Appendix - p.48).

2) **McKenna's Opposition to Nestle's Harassment**

McKenna opposed Nestle's harassment with no less than FIVE (5) defensive emails, such as:

> "As far as some of her UNCONTESTED allegations (IE - not DEFENDED, by me at deposition.... which by the way are uncorroborated, because in fact they are impossible to, cause they didn't happen), is because I *KNOW* she is delusional, and to this day in my life, she is THEE single most hostile entity I have ever encountered, and I WILL NOT CONFRONT her until I have completely resolved to myself that I am

> literally willing to take her life, in **defense** of my life, and/or those around me."
>
> "Oh ya.... one last thing... this seeking relationship(s) with MEN.... go for it.... get any proof of that ANYWHERE other than the sex-crazed, dellusional allegation(s) of Nancy Goss. What an idiot. DON'T you THINK for one minute that I will allow these horrid allegations of hers go UNCHECKED in Court... trust me, you will witness her life getting CRUSHED like a light-bulb hitting the ground.... and THEN, since I will have attacked her dellusion(s), I must them prepare to **defend** the consequenses of that act.... and be prepared to **defend** my life, with my life, which I will do at that time."

On January 15, 2007, in reply to Dickerson's harassing email that was again immediately appended below McKenna's reply, now understandably exasperated by Nestle's ongoing harassment, McKenna sent a *distraught email* in direct reply to Dickerson's harassing email. Of critical importance: The *distraught email* that McKenna had sent Dickerson contained an *extremely harsh rejection* of Goss's (a stalker's) delusional perception(s) of Goss's past workplace friendship with McKenna.

On January 17, 2007, McKenna replied to Dickerson's harassing email, which was *again* immediately appended below McKenna's reply. However, this time McKenna stated further Title VII action may be initiated against Nestle for the sexual harassment *now* being perpetrated by Nestle's legal counsel! **(Please see Appendix pp. 46 – 48).**

2) Nestle's Retaliation Against McKenna:

Within *less than* forty-five **hours** of receiving McKenna's reference to further Title VII action, which may be initiated against Nestle for Dickerson's harassment of McKenna, *both* Dickerson and Secrest engaged in a coordinated conspiracy to now "explain" to McKenna why it is McKenna should not take *any* Title VII action against Nestle. Nestle's attorneys now set on course to mis-paint McKenna's week-old *distraught email* in **opposition** to Dickerson's harassment of McKenna acting as Goss's conduit, and paint that email as a "threat" against Goss.

To now create *false* motive for McKenna's *distraught email* to Dickerson, Dickerson drafted a *false* Court document (*fraudulent* document) [1], *falsely* asserting that the motive for McKenna's *distraught email* which McKenna sent to Dickerson, was now allegedly motivated by deposition testimony by Goss, which had been taken approximately three months prior, "**sealed 'until trial'**", which McKenna did ***not*** have access to at that time. Dickerson *falsely* asserts that Goss's testimony allegedly revealed an "almost year-long sexual relationship". As previously articulated herein, that fact was stipulated to by both parties, long prior to Goss's deposition in October 2006 [2]. Dickerson's *fraudulent* document also *falsely* asserts without any possible evidentiary support, that security personnel escorted McKenna out, when McKenna had previously visited Nestle's corporate offices:

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[1] Case: 2:05-cv-00976-ALM-TPK Doc #: 71 Filed: 01/19/07 Page: 1 of 2 PAGEID #: 857

[2] See pp. 9-10, at section: "**C. Stipulation By The Parties to a Prior Adulterated Workplace Friendship, Prior to Deposition of Goss.**"

> "On October 17, 18, and 19, 2006, Nestle and Plaintiff deposed Goss. Generally, Goss's testimony revealed her and Plaintiff conducted an almost year-long sexual relationship. Additionally, Goss testified as to specific sexual acts, sexually explicit conversations, and sexually explicit emails that transpired between her and Plaintiff. Goss's testimony undermines Plaintiff's case and claims."
>
> "Plaintiff previously visited Nestle's corporate offices in St. Louis, demanding to meet with certain corporate personnel, and was escorted out by security. Accordingly, Nestle feels it must formally inform the Court of these threats to Goss, and just inform Goss as well. To that end, Goss is being served with a copy of this Notice."

On January 19, 2007 at 1:12 PM, to eliminate the *true* motive for McKenna's *distraught email* to Dickerson, and to create a *false* exhibit (*fraudulent* exhibit) in support of Dickerson *fraudulent* document. Secrest forwarded McKenna's *distraught email* to himself, redacting McKenna's *distraught email* to Dickerson, by completely removing Dickerson's entire harassing email (Appendix p. 48), which had previously been appended immediately below McKenna's *distraught email*, from the content of the now *fraudulent* exhibit [3].

On January 19, 2007, Dickerson then formally filed Dickerson's *fraudulent* document supported by

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[3] Case: 2:05-cv-00976-ALM-TPK Doc #: 71-1 Filed: 01/19/07 Page: 2 of 2 PAGEID #: 856.

Secrest's *fraudulent* exhibit with the District Court (*fraudulent* filing). At 4:57 PM, Nestle made *electronic* service of the *fraudulent* filing upon McKenna, and under the alleged pretext that since now the *fraudulent* filing allegedly constituted an "overt threat" against Goss that the *fraudulent* filing would be formally served upon Goss! Significantly, Nestle requested the District Court to ascertain the severity of this threat [4].

On January 20, 2007, in the very early morning (**just past midnight**), within less than eight (8) hours of receiving electronic service Nestle's *fraudulent* filing, McKenna tried desperately to halt the perversely adverse actions of Nestle's attorneys against McKenna **(Please see Appendix pp. 49 – 52)**.

On the afternoon of Saturday January 20, 2007, McKenna received conventional *ground mail* service of Nestle's *fraudulent* filing. Goss and McKenna reside within the same postal zip-code. As such Goss would have received *actual service* of documents on that same day, which is also circumstantially supported by the Muskingum County Sheriff's Departments January 22. 2007 official report (report) on the matter. According to that same report, Goss had not received *actual service* of *fraudulent* exhibit at that time.

On Monday January 22, 2007, at approximately 12:00 PM the District Court granted McKenna's urgent request for a conference for the Court's intervention into the matter (conference). The conference was presided over the case's Magistrate Judge, Terrence P. Kemp (Judge Kemp),

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[4] Case: 2:05-cv-00976-ALM-TPK Doc #: 70 Filed: 01/19/07 Page: 2 of 3 PAGEID #: 853

with McKenna, his wife, daughter [5], and Secrest in representation of Nestle, in attendance. Judge Kemp initiated the conference with Nestle's *fraudulent* exhibit, which had been filed by Nestle with the District Court on Friday, January 19, 2007, already laying on the conference table immediately before him. In accordance with Nestle's request that the *District Court* ascertain the severity of the threat [6], **Judge Kemp stated directly to Secrest, that the District Court had ascertained that McKenna's *distraught email* did *not* constitute a threat against Goss.** As such, Judge Kemp then sought to halt *actual service* of the *fraudulent* exhibit upon Goss.

To circumvent Judge Kemp's attempt to intervene, Secrest himself then *falsely* represented to Judge Kemp that *actual service* of the *false* exhibit had in fact *already* been executed upon Goss (*fraudulent* representation). In reliance upon Secrest's *fraudulent* representation to Judge Kemp that *actual service* of the *fraudulent* exhibit upon Goss had in fact *already* been executed, Judge Kemp had then dismissed the conference upon the grounds that the Court could not halt an event, which Secrest *fraudulently* represented, had already occurred.

On Monday January 22, 2007, the Muskingum County Sheriff's Report (report) states that at approximately 6:00PM Secrest had made *actual*

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[5] McKenna's wife and daughter attended the conference as witnesses who had accompanied McKenna during McKenna's visit to Nestle's corporate headquarters', to offer testimony that McKenna did ***not*** "demand" to meet with anyone, ***nor*** was McKenna "escorted" out by anyone, ***nor*** was there any "security" personnel involved at any time, as falsely alleged in Nestle's fraudulent Court filing.

[6] As was expressly requested by Nestle at - **Case: 2:05-cv-00976-ALM-TPK Doc #: 70 Filed: 01/19/07 Page: 2 of 3 PAGEID #: 853**

service of the *fraudulent* exhibit upon Goss. Critically important is that Secrest made *actual service* of the *fraudulent* exhibit upon Goss, where less than just six hours prior, Secrest had witnessed that Judge Kemp had ascertained that McKenna's email was ***not*** a threat and would have issued a Court ORDER that Secrest ***not*** disclose the *fraudulent* exhibit upon Goss had Secrest not falsely represented that *actual service* of the *fraudulent* exhibit had *already* been executed upon Goss.

At approximately 6:26PM a Muskingum County Sheriff's deputy (deputy) was dispatched to Goss's residence, according to the report that based upon Goss's expressly stated reliance upon the context of the *fraudulent* filing *and* *fraudulent* exhibit which had been formally served upon Goss by Secrest and Dickerson acting as legal counsel for Nestle, Goss filed *false* charges of criminal menacing against McKenna.

On Monday January 22, 2007 at approximately 7:45PM, the deputy was dispatched to McKenna's residence. The deputy explained to McKenna that Goss had received the *fraudulent* exhibit, which had been disclosed by Secrest at approximately 6:00PM that same night. Outraged by Secrest's actions, McKenna informed the deputy that the matter had just been raised before Judge Kemp, no more than six (6) hours earlier that very same day with Secrest present! McKenna informed the deputy that Judge Kemp had already ascertained and informed Secrest that the *fraudulent* exhibit did ***not*** constitute a threat against Goss. McKenna also informed the deputy that Judge Kemp had in fact sought to prevent disclosure of the *fraudulent* exhibit by Nestle's attorneys earlier that same day.

Significantly, Dickerson and Secrest who assert to have been in some sort of allegedly orchestrated fear of an alleged "overt-threat" on Goss's life, premeditatedly chose ***not*** to make *direct* notice of this alleged threat *directly* to Goss. But rather Dickerson and Secrest made notice a full week later by taking the time to draft, file, and make *ground mail service* of two (2) formal Court documents, while Goss and McKenna's residences were separated by less than approximately twenty (20) minutes driving time. The Court documents speak on behalf of "Nestle" *not* "Dickerson" or "Secrest" actual people who can have "fear", *but* instead that it was "Nestle" a *business*, that is allegedly in "fear".

On Wednesday January 24, 2007, the Captain of Muskingum County Sheriff Department forwarded Goss's formal complaint of criminal menacing against McKenna to the Muskingum County Prosecuting Attorneys Office (PAO). The PAO dismissed the criminal charges against McKenna for the same reason found by the Judge Kemp prior to Secrest disclosing the *fraudulent* exhibit to Goss, finding that the email did ***not*** constitute a threat against Goss.

On Friday January 26, 2007, McKenna sought professional medicinal intervention to relieve emotional/psychic trauma as both a direct and indirect result of actions of attorneys Dickerson and Secrest by re-exposing McKenna to Goss. As a result of Dickerson's and Secrest's actions, McKenna remained medicated for several months, and thereafter suffered withdraw symptoms from the prescription medication.

III. PROCEEDINGS BELOW

On March 14, 2008, McKenna filed a complaint against Nestle in the Federal District Court of Southern Ohio - Eastern Division, under "42 U.S.C 2000e-5(f)(1) and 4112.02 of the Ohio Civil Rights Code". McKenna's complaint states:

> "I, Kevin H. McKenna am a:
>
> 1) Victim of discrimination as a Title VII complainant, by Nestle Purina PetCare Co. [...]
> 2) Victim of intentional actions taken by Nestle Purina PetCare Co., against me, which inflicted emotional distress/harm upon me".

McKenna's complaint also includes a lengthy sequence of detailed, factual statements, which support McKenna's allegations, each of which already have evidentiary support (Appendix pp. 20 - 45).

On April 10, 2008 Dickerson and Secrest filed a motion to dismiss McKenna's state and federal employment discrimination claims under Federal Rules of Civil Procedure – Rule 12(b)(6). Nestle's motion to dismiss alleges that 1) McKenna failed to allege a prima-facie case of retaliation, in that it was Goss, not Nestle who filed the actual complaint of criminal menacing against McKenna. 2) McKenna's *employment discrimination* complaint citing emotional/ psychic harm which McKenna **inarguably** *did* suffer as a *direct* result of Nestle's actions, were insufficient to support a claim that Nestle's conduct "was outrageous and extreme and beyond all possible bounds of decency and was such that it can be

considered as utterly intolerable in a civilized community" as is requisite under *Restatement of Torts* "Intentional Infliction of Emotional Distress".

On March 24, 2009 the District Court GRANTED Nestle's motion to dismiss McKenna's employment discrimination claim on the grounds that 1) "McKenna clearly has not alleged a *prima facie* case of retaliation, primarily because of his inability to establish the third prong"; "Reviewing both McKenna's Complaint and McKenna's Response in Opposition, however, reveals no allegation that Nestle ever filed criminal charges against McKenna"; "The assertion that Nestle could in any way be liable for the actions of Goss is unsupportable", and 2) "To state a claim for intentional infliction of emotional distress McKenna must allege that: Nestle's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community"; "Nothing done by Nestle was extreme or outrageous" (Appendix pp. 8 – 10).

On April 10, 2009 McKenna appealed the decision of the District Court. On November 23, 2009, the Sixth Circuit of Appeals, AFFIRMED by simply reiterating the District Court's dismissal, citing: "McKenna has not adequately alleged facts demonstrating that Nestle was involved in the filing of the criminal charges. Further, neither action was so extreme and outrageous as to give rise to a claim of intentional infliction of emotional distress" (Appendix p. 18).

REASONS FOR GRANTING THE PETITION

The *facts* as are asserted in this case are *not* mere "allegations". For each "allegation" as they have been asserted in the original Complaint and herein, *already* have *direct* evidentiary support. The only reason this case now comes before this Court, is because of the lower Courts' apparent *carte blanche* adoption or "rubber-stamping" of inapposite legal standards, which are established by the apparent "supreme" authority of Nestle's legal counsel.

Furthermore, the "rubber stamping" of inapposite legal standards by the lower Courts, is in direct contravention of several of this Court's *well-settled* precedents of the United States Supreme Court. Significantly, the lower Courts have not provided *any* compelling reason(s) whatsoever for the lower Courts departure from the doctrine of *stare decisis*.

As such, McKenna now humbly prays this Court engage in an exercise of this Court's supervisory power, as the facts and justice in this case demands, *and* to restore stability, predictability, and respect for exercise of judicial authority.

I. Disposal of This Case Requires Minimal Resources of this Court.

Simply stated, the actions of the lower Courts are so extraordinarily contrary to several of this Court's *well-settled* precedents, so clearly in error *and* to such an extent, it warrants this Court's intervention. It is for those same aforementioned facts that it also makes it completely appropriate for

this Court to *summarily* dispose of, or otherwise reverse and remand the case, without any requirement for briefing or argument by this Court.

"Considerations of stare decisis have special force in the area of *statutory interpretation*, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-173 (1989) (*emphasis* added).

> "Time and time again, this Court has recognized that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch*, supra, at 494; see also *Patterson v. McLean Credit Union*, 491 U. S. 164, 172 (1989); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Adherence to precedent promotes stability, predictability, and respect for judicial authority. *Vasquez v. Hillery*, 474 U. S. 254, 265-266 (1986). For all of these reasons, we will not depart from the doctrine of *stare decisis* without some compelling justification. *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984)."

Hilton v. South Carolina Public Railways Comm'n, 502 US 197, 202 (1991), *Cf.* also *St. Mary's Honor Center v. Hicks*, 509 US 502.

The lower Courts' complete disregard for *stare decisis* in this case, effectively refusing to tend to the business of this Court, has lead to the perverse results of a *pro se* employment civil rights litigant petitioning the highest Court in the land.

II. Title VII is of the Highest Priority.

McKenna, while acting in the cast role of a "private attorney general" on behalf of all Americans' rights, through his private action, was discriminated against by the acts of Nestle's legal counsel, in the most perverse way possible. More perversely, these actions can only have been taken against McKenna, but for the perpetrators' standing as attorneys, by access to privileged information while expressly cast in the role of agents for Nestle. Failure of this Court to intervene on this matter at this time would be tragic. These acts cannot be left unpunished.

This Court has on many occasions reiterated that a Title VII plaintiff is thee essential means to insure the Civil Rights Act of 1964 works, "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority,'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980), *Fogerty v. Fantasy, Inc.*, 510 U.S. 523, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (both citing *Christiansburg Garment Co. v. EEOC*, 434 U. S. 417 (1978)). "[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII.... In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). See also *H.R. REP. NO.* 102-40, pt. 2, at 34 (1991) (report of the committee on the judiciary describing how the failure to adequately compensate plaintiffs has a chilling effect on the

'private attorneys general' policy of the civil rights laws).

The Second, Fifth, *Sixth* and Eleventh Circuits in favorable concurrence, have cited the Courts' role in the enforcement of Title VII:

> "Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. *It is, therefore, the duty of the courts to make sure that the Act works*, and the intent of Congress is not hampered by a combination of a strict construction of the statute in battle with semantics." (*emphasis* added)

Guardians Assoc. of New York Police Dept., Inc. v. Civil Service Commission, 633 F.2d 232, 254 (2d Cir.1980); *Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir.1999); *Parr v. Woodmen of the World Life Ins.* Co., 791 F.2d at 892 (11th Cir.1986) (quoting *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir.1970)).

III. Held in Abeyance Pending Final Disposition of *Staub v. Proctor Hospital* (No. 09-400, Cert. Granted April 19, 2010)

Although circumstances in this case are in the employment retaliation context under Title VII, this Court's pending opinion in *Staub v. Proctor Hospital* (No. 09-400 – Cert. Granted April 19, 2010), is very likely to be relevant to this case. In the case that this Court would not immediately grant McKenna's Petition and *summarily* dispose of this case, given the similarity of "cat's paw" circumstances between

this case and *Staub*, it would seem appropriate that this case be held in abeyance until this Court disposes of *Staub*. Then without full plenary review, this Court could then rely on *Staub* as an additional basis to summarily dispose of, or reverse and remand McKenna's case to the lower Courts.

IV. Justice demands an exercise of this United States Supreme Court's supervisory power (S. Ct. R. 10(a)).

A. The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower Court.

1) Lower Court Disregard for *Conley v. Gibson*:

Simply stated, the lower Courts sanctioning of heightened pleading requirements as is expressly framed by Nestle, let alone upon a *pro se* employment civil rights litigant, is un-supported by established law.

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the

> just, speedy, and inexpensive determination of every action.' Rule 1.".

Foman v. Davis, 371 US 178, 181-182 (1962), citing *Conley v. Gibson*, 355 US 41 (1957).

As this Court has pointed out, "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

2) Lower Court Disregard for *Haines v. Kerner*.

There is nothing McKenna can argue, which this Court has not already articulated itself:

> "The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is "to be liberally construed," *Estelle*, 429 U. S., at 106, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.*".

Erickson v. Pardus, 551 US (2007) (citing *Haines v. Kerner*, 404 US 519 (1972)).

> "[A]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957)."

Haines v. Kerner, 404 U.S. 520-521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

The lower Courts construed nothing in McKenna's favor, let alone liberally construed, and made no inferences favorable to McKenna, let alone liberally. The lower Courts disregarded all facts alleged in McKenna's complaint. Facts in support of the lower Courts' dismissal of McKenna's complaint are construed favorably from facts errantly accepted as true as alleged by the defendant.

3) **Lower Court Disregard for *BNSF v. White*:**

The lower Courts have unlawfully bifurcated harms alleged within McKenna's employment discrimination claims. The lower Courts are requiring that emotional/psychic harm suffered by McKenna as a direct result of retaliatory harassment which occurred within the context of state and federal employment civil rights proceedings, must meet the inapposite bar of relief under Restatement of Torts, Intentional Infliction of Emotional Distress.

This Court has held, "The employer's actions must be harmful to the point that they could well

dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. v. White* U.S., 126 S.Ct. 2405, 2409, 165 L.Ed.2d 345 (2006). The lower Courts' requirement that, "plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it", in the employment discrimination context simply stated is an outrageous and inapposite bar of relief.

4) Lower Court Disregard for *Harris v. Forklift Systems*.

This Court has already rejected a lower Sixth Circuit standard stating that harm suffered must "seriously affect [an employee's] psychological well-being" or leads the plaintiff to "suffe[r] injury." *Harris v. Forklift Systems, Inc.*, 510 US 17 at 20 (1993). This Court could not have made it any clearer, Title VII does *not* require concrete psychological harm:

> "We therefore believe the District Court *erred* in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury." Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor*, supra, at 67, there is no need for it also to be psychologically injurious."

Harris at 22. "This is not, and by its nature cannot be, a mathematically precise test... ... no single factor is required" *Harris* at 22-23.

Incredibly, in this action dismissing a *pro se* complaint under FRCP Rule 12(b)(6), a circumstance which mandates utmost liberal construction, the District Court and Sixth Circuit have *raised* the bar to relief that a *pro se* complaint must allege in an employment discrimination context, that "plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it".

5) **Lower Court Disregard for *Swierkiewicz v. Sorema*:**

This Court has consistently rejected heightened pleading standards not required by the Federal Rules themselves. For instance, in 2007, this Court rejected the Sixth Circuit's requirement that prisoners plead and demonstrate exhaustion in complaints under the Prison Litigation Reform Act. This Court reiterated:

> "In *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506 (2002), we unanimously reversed the court of appeals for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination. We explained that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," and a "requirement of greater specificity for particular claims" must be obtained by amending the Federal Rules. *Id.*, at 515 (citing

> *Leatherman*). And just last Term, in *Hill v. McDonough*, 547 U. S. ___ (2006), we unanimously rejected a proposal that §1983 suits challenging a method of execution must identify an acceptable alternative: "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determineations of the federal courts." *Id.*, at ___ (slip op., at 8) (citing *Swierkiewicz*)."

Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

In a prior case before the District Court, where the plaintiff was *not* preceding *pro se*, actually represented by legal counsel, the District Court actually **volunteered** *Swierkiewicz*'s holding:

> "This Court's analysis of the proper pleading standard for Plaintiff's disability discrimination claim is guided by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), though neither party cites this case in their respective briefs. Therefore, an overview of *Swierkiewicz* is necessary. See *Jackson v. Crosset Co.*, No. 01-6262, 33 Fed.Appx. 761, 763, 2002 U.S.App. LEXIS 6039, at *3-4 (6th Cir. Mar. 29, 2002) (applying Swierkiewicz and stating "[t]o survive a motion to dismiss, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief" (citing Swierkiewicz, 534 U.S. at 512, 122 S.Ct. 992))." (emphasis added)

Witte v. Rippe & Kingston Systems, Inc., 358 F.Supp.2d 663-665 (S.D. Ohio Feb 28, 2005).

> "The Court notes that although the *Swierkiewicz* Court focused its inquiry on whether an employment discrimination plaintiff is required to plead facts constituting a prima facie case of discrimination under the McDonnell Douglas framework, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), this Court finds that regardless of whether a plaintiff proffers direct or indirect evidence of disability discrimination, the FED.R.CIV.P. 8(a) pleading requirements apply to all employment discrimination cases. The direct evidence proof model, by logical extension, is an evidentiary standard, and therefore, is not a pleading requirement." (emphasis added)

Ibid at footnote #5.

However, in McKenna's case, the same District Court and same district judge, held McKenna's *pro se* complaint which "must be held to less stringent standards than formal pleadings drafted by lawyers" (*Erickson*), to an inapposite, higher *summary judgment* evidentiary pleading requirement, citing:

> "In order to establish a prima facie case of retaliation, McKenna must show that: (1) he engaged in a protected activity; (2) Nestle knew that he engaged in the protected activity; (3) as a result of McKenna exercising his protected rights, Nestle took an employment action adverse to him; and (4) a

> causal connection exists between the protected activity and the adverse employment action. See *Fenton v. HiSAN*, 174 F.3d 827, 831 (6th Cir. 1999).
>
> Construing McKenna's Complaint in the light most favorable to him, McKenna clearly has not alleged a prima facie case of retaliation..." (emphasis added)

(Appendix p. 6). The obsolete *Fenton* standard is a *summary judgment* standard, and is inapposite to any discrimination pleading requirement under FRCP Rule 8(a).

The Sixth Circuit has also acknowledged this Court's holding in *Swierkiewicz* on several occasions, for instance:

> "[Plaintiff] was not required to plead her prima facie case, *cf. Swierkiewicz v. Sorema* N.A., 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding in a Title VII case that "it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the McDonnell Douglas framework does not apply" when there is "direct evidence of discrimination")."

Back v. Hall, 537 F.3d 552, 558 (6th Cir. 2008).

> "The Supreme Court has previously warned lower courts against imposing heightened pleading requirements in the context of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *Swierkiewicz v.*

> *Sorema N.A.*, 534 U.S. 506, 512-13, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).)"

Owens v. Keeling, 461 F.3d 768 (6th Cir. 2006) - at footnote #1.

McKenna specifically raised *Swierkiewicz* in his Appellant Brief to the Sixth Circuit, and again in McKenna's petition for rehearing. Undeterred, the Sixth Circuit completely disregarded McKenna's arguments citing *Swierkiewicz* and affirmed the District Court's order, *again* citing that McKenna must *establish* a prima facie case:

> "To establish a prima facie case of retaliation, a plaintiff must establish that 1) he engaged in protected activity, 2) the employer knew of the exercise of the protected right, 3) an adverse employment action was subsequently taken against the employee, and 4) there was a causal connection between the protected activity and the adverse employment action. *Hawkins v. Anheuser- Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008)" (Appendix p. 6)

Significantly, the Sixth Circuits' reliance on *Hawkins* is also a *summary judgment* evidentiary requirement, and is *again inapposite* to McKenna's *pro se* FED. R. CIV. P. 8(a) pleading requirements.

B. United States Court of Appeals of the Sixth Circuit has entered a decision in conflict with the decision the United States Court of Appeals of the Tenth Circuit on the same important matter *and* in a way that conflicts with a relevant decision of this Court.

Tenth Circuit of Appeals in affirming the findings of the District Court for the District of Colorado, found actionable retaliation where it was *only* "more probable than not", that the employer "caused", "used", "encouraged", etc. an adverse action.

Specifically the Tenth Circuit cited: "The court found it to be *more probable than not* that Stevinson and others in management at Toyota West ***caused*** Szekula *to initiate* the criminal complaint ... for the purpose of retaliating against Reynolds for his having filed a discrimination charge with the EEOC. The sequence and timing of these events, including Szekula's delay in going to the authorities, is sufficient probative circumstantial evidence that Toyota West and Stevinson ***used*** and ***encouraged*** Szekula *to initiate* this investigation and prosecution. *Berry*, 804 F.Supp. at 131." (***emphasis*** added) *Berry v. Stevinson Chevrolet*, 74 F. 3d 987 (CA10 1996).

This Court unambiguously stated, "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2412 (2006). In doing so this Court specifically cited the Tenth Circuit's finding in *Berry* as actionable retaliation:

"*Berry v. Stevinson Chevrolet*, 74 F. 3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where *employer filed* false criminal charges against former employee who complained about discrimination)." *Id.*.

As the Solicitor General pointed out in the Brief for the United States as Amicus Curiae, in support of *Vincent E. Staub v. Proctor Hospital* (Petition No. 09-400 at p. 9 – Cert. Granted April 19, 2010), allegations in McKenna's claim already complies with the Sixth Circuit standards:

> "But as petitioner notes (Pet. 15-32), it is inconsistent with the decisions of ten other courts of appeals, which have imputed liability to an employer when a biased subordinate influenced, but did not herself take, the adverse employment action. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Rose v. New York City Bd . of Educ.*, 257 F.3d 156, 161-162 (2d Cir. 2001); *Abramson v. William Patterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000); ***Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 677 (6th Cir. 2008)**; *Stacks v. South- western Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-1323 (8th Cir. 1994); *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007); *BCI Coca-Cola*, 450 F.3d at 487; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998)." (**emphasis** added)

McKenna's *pro se* complaint does sufficiently allege at statement 25 (Appendix p. 28) that Nestle's attorneys falsified a materially relevant document, and at statements 44 - 49 (Appendix pp. 33 – 34) Goss relied upon that false information. Direct evidence *already exists* which establishes that adverse actions taken by Goss against McKenna was in reliance upon *false* information provided by Nestle.

The Sixth Circuit's dismissal of McKenna's complaint is not only at odds with the Tenth Circuit in *Berry v. Stevinson*, which is favorably cited by this Court in *BNSF v. White* as actionable retaliation, making it at odds with this Court, but the decision is also at odds with the Sixth Circuits' own precedent: "By *relying* on this discriminatory information flow, the ultimate decisionmaker[s] 'acted as the conduit of [the agent's] prejudice—his cat's paw.' *Christian*, 252 F.3d at 877 (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990))."*. Madden v. Chattanooga City Wide Serv.* Dept., 549 F.3d 666, 678 (6th Cir. 2008).

V. McKenna *has* adequately alleged facts demonstrating that Nestle was involved in the filing of the criminal charges against McKenna.

Even against heightened pleading requirement abrogated by this Court in *Swierkiewicz*, upon *plain reading* of factual allegations of McKenna's *pro se* complaint, McKenna's complaint *does* sufficiently allege a causal connection. Statement 25(a) (Appendix p. 29) alleged that Nestle's attorneys falsified a material document. Statements 44 – 49 (Appendix pp. 32-33) allege that Nestle made service of that false document upon Goss, *and* that adverse action taken by Goss against McKenna *was in reliance upon that false document.* In fact, those "allegations" are supported by already existing *direct evidence.*

Sixth Circuit precedent provides a basis for McKenna's complaint, "By *relying* on this discriminatory information flow, the ultimate decisionmaker[s] 'acted as the conduit of [the supervisor's] prejudice—his cat's paw.' *Christian*, 252 F.3d at 877 (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990))." *Madden v. Chattanooga City Wide Serv.* Dept., 549 F.3d 666, 678 (6th Cir. 2008). Furthermore, *Berry v. Stevinson*, specifically cited by this Court in *BNSF v. White* further supports the causation standard in the retaliation context. Even further yet, the "cat's paw" theory of employer liability inferred by McKenna's complaint, is not only supported by the Sixth Circuit's holding in *Madden*, but is also a viable basis just as in *Staub v. Proctor Hospital* (09-400 Cert. Granted, April 19, 2010).

VI. McKenna *has* adequately alleged facts demonstrating that Nestle *sexually harassed* McKenna during the course of Title VII Litigation.

McKenna's complaint also sufficiently alleges McKenna was a victim of sexual and/or retaliatory harassment by Nestle, directly by and through Nestle's legal counsel at statements 20 – 21 (Appendix p. 27). Requisite *mens rea* is also alleged in McKenna's complaint at statement 25(a) (Appendix p. 28), where McKenna alleges that Nestle's legal counsel *premeditatedly* redacted the incriminating content of that sexual/ retaliatory harassment from the document [7], which Nestle filed with the District Court on January 19, 2007.

This Court has stated the general rule that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993). This Court explained that a client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Pioneer Inv. Servs.*, 507 U.S. at 397, 113 S.Ct. at 1499 (internal quotations and citations omitted).

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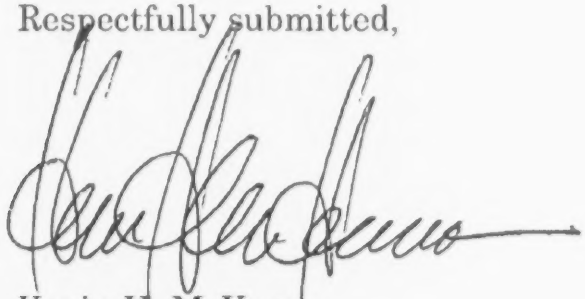
CONCLUSION

For the above reasons, as Justice demands, and for any other reason(s) this Court may deem appropriate when liberally construed most favorably to the Petitioner *pro se*, a writ of certiorari is appropriate to review the order of United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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